United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-4257

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

YI CHUN CHENG, Petitioner -v- IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	Docket No. 76-4257

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P/S

PETITIONER'S REPLY BRIEF
WITH SUPPLEMENTAL APPENDIX

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PETITIONER'S REPLY BRIEF

Statement

Petitioner respectfully submits this brief in reply to the arguments and contentions set forth in respondent's brief.

Respondent accuses petitioner of abusing the process of this Court. According to respondent, petitioner secured an undeserved automatic stay of his deportation by petitioning for review of an allegedly interim order which petitioner knew to be outside the jurisdiction of this Court. In respondent's view such stay was utilized, as intended, to obtain review of the main order in which respondent invites the Court to decline substituting its judgment for the sound discretion of the Board of Immigration Appeals (BIA).

The nature and thrust of respondent's contentions require at this time an argument, as to jurisdiction, which petitioner felt unnecessary to his main brief. Respondent's contentions also require a restatement of the case and supplementary arguments as to the real issues which may become blurred if respondent's overly-selective assertions were to go unchallenged.

Restatement of the Case

Pursuant to 8 U.S.C.1105(a) petitioner asks this Court to review two final orders of the BIA, entered in proceedings after his deportation hearing was closed but nonetheless intimately connected therewith.*

In its earlier order of November 23, 1976 the BIA denied petitioner's application, made as permitted by 8CFR 3.8**, for stay of his actual deportation, while the BIA considered the question of whether petitioner's deportation hearing would be reopened to cancel his deportation under suspension of deportation provisions; or to permit petitioner to leave voluntarily in lieu of deportation. Respondent contends in

*Petitioner had applied for a stay of deportation when he appealed the Immigration Judge's refusal to reopen his deportation hearing and he merely renewed this application when seeking reconsideration of the appeals dismissal. (See Supp. Appendix SA-1)

** In its brief at p.9 respondent omitted that part of 8CFR 3.8 pertaining to stay of deportation pending reopening or reconsideration.(See Supp. Appendix SA-3)

"Point I" of its brief that this order is outside the jurisdiction of this Court, created by 8U.S.C.1105(a); and respondent cites several cases in support of this contention. Petitioner firmly disputes respondent's contentions, including the applicability of the cited cases which bear only a superficial resemblance to this particular issue and fact pattern.

The later order of January 19, 1977 denied two separate forms of discretionary relief requested by petitioner. In that order the BIA refused to reopen petitioner's deportation hearing as he requested and where he expected to apply for either suspension of deportation or, alternatively, for a de novo grant, by the Immigration Judge, of voluntary departure.

As to suspension of deportation the BIA eventually recognized that, because of evidence already in the record, petitioner's literal non-compliance with requirements as to affidavits and evidentiary material accompanying his motion to reopen was an insubstantial technical flaw; and that his claims of "extreme hardship" were not as "naked" as previously claimed. However the BIA found that such cumulative "evidence" cited by petitioner, even if accepted as true, would not constitute extreme hardship under the applicable statute; and therefore found that no useful purpose would be served by reopening the hearing for filing an application for suspension of deportation.

Even though the BIA findings and conclusions were with respect to "extreme hardship" which is one of three statutory prerequisites for a discretionary grant of suspension of deportation, and even though the BIA did not reach the issue of discretion, respondent contends in its brief that the BIA exercised its sound discretion in finding that no useful purpose would be served in reopening the deportation hearing for an application relative to suspension of deportation; and respondent contends that this Court should review that portion of this BIA order, only as to whether there was an abuse of discretion.

As to a de novo grant of voluntary departure, the BIA order of January 19, 1977, completely ignored petitioner's request, made in "Point III" of his motion to reconsider dated November 18, 1976 (AR 16), that his eligibility for this form of relief should be evaluated in terms of whether his failure to depart June 8, 1976 (the last extension of voluntary departure) constituted a "deliberate defiance of constituted authority" which, among others, was one of the elements that could meet the "strong extenuating circumstances" standard established for evaluating the propriety of a second grant of voluntary departure by the BIA or an Immigration Judge.*

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* In Matter of Yeung 13 I&N Dec. 528 the BIA illustrated at p.534 that "extenuating circumstances" may be established if the failure to depart did not constitute a deliberate defiance of constituted authority.

In its brief at p.23 respondent similarly ignored petitioner's claim made in the first paragraph of p.15 of his brief that failure to depart by June 8, 1976 was not due to a deliberate defiance of constituted authority;but was for the reasons of his understandably awaiting the outcome of his application he timely filed for the substantive relief of having his deportation suspended. Respondent would have this Court believe that there is nothing in the record that could have led the BIA to conclude that there were "extenuating circumstances", within the meaning of the standards set by the BIA.

SUPPLEMENTARY ARGUMENTS

I

THIS COURT DOES NOT LACK SUBJECT MATTER JURISDICTION TO CONSIDER A DENIAL BY THE BIA OF A STAY OF DEPORTATION.

Contrary to respondent's contentions, the law is not clear as to this Court's lack of jurisdiction to review the BIA denial of petitioner's application for a stay of deportation. The law of the cases respondent cites never decided this issue and do not support the contentions as to jurisdiction which respondent raises.*

* Respondent cited Li Cheung v. Esperdy, 377 F.2d 819, 820 (2d. Cir. 1967); Tai Mui v. Esperdy, 371 F.2d 722, 775-777 (2d. Cir.1966), Kwok v. INS, 392 U.S.206 (1968); Colato v. INS, 531 F.2d 678, 679 (2d Cir. 1976) and Hernandez v. INS, 539 F.2d 384,385 (5th Cir.1976). Li Cheung, Tai Mui and Kwok decided issues involving a stay of deportation, denied by the District Director in proceedings unconnected with Sec. 1252(b). Hernandez never sought review of the/

Petitioner submits that this issue is one of novel impression in this Circuit and believes that his claim as to this Court's having jurisdiction to review the BIA order of November 23, 1976, is supported by Kwok v. INS 392 U.S.206 at p.216 and Colato v. INS 531 f2d.678 at p. 680. In Kwok v. INS, supra, the Court stated:

> "...We hold that the judicial review provisions of §106(a) embrace only those determinations made during a proceeding conducted under §242(b), including those determinations made incident to a motion to reopen such proceedings..." (Emphasis supplied)

In Colato v. INS, supra, this Court indicated that denial of discretionary relief, intimately connected with a deportation proceeding was reviewable by this Court, under §1105(a).

Refusing to stay petitioner's deportation was a determination made incident to petitioner's motion to reopen his deportation hearing. The application for a stay was an integral part of the appeal from the denial of the motion to reopen (SA-1) and remained a part thereof when the appellate proceedings were extended in the motion to reconsider dismissal of the appeal.

/BIA refusal to stay her deportation pending reopening. She had claimed that refusal of the stay was an effective dismissal of her appeal from denial of her motion to reopen. The actual jurisdictional issue decided by the 5th Circuit was her failure to exhaust remedies by going to that Court while her appeal was still pending.

Respondent invites the Court to decline jurisdiction as á way of preventing frustration of deportation orders. Petitioner believes that expedited and summary disposition of actually frivolous and dilatory litigation has been the traditional effective judicial remedy and it should not be necessary for the Court to curb actual abuses through mounting of a jurisdictional barrier that does not exist in the relevant statute.

II.

THE BIA REFUSAL TO REOPEN PETITIONER'S DEPORTATION HEARING SHOULD BE REVIEWED AS TO THE STATUTORY INELIGIBILITY FOUND BY THE BIA

In finding that petitioner did not make a prima facie showing of statutory eligibility, preliminary to a discretionary grant of suspension of deportation, such finding is subject to a searching scrutiny for proper application of the conditions prescribed in the suspension of deportation statute. Hang v. INS 369 F2d. 715 (2d Cir.1966). If the BIA had made a finding that petitioner failed to make a prima facie showing that he merited the favorable exercise of discretion, then respondent's contention would be correct that the Board's finding as to suspension of deportation would be reviewable only by the abuse of discretion standard.

The evidence in petitioner's immigration record, coupled with the new evidence of having 7 years residence previously

unavailable at his original deportation hearing, appears to have been sufficient, prima facie, to reopen for suspension of deportation. Under the flexible formula set forth in Matter of Sangster 11 I&N Dec. 309 petitioner had a good chance of establishing in a reopened hearing"extreme hardship" which is to be distinguished from the requirement as to "extremely unusual and exceptional hardship" applicable to a group of aliens that does not include petitioner. (See petitioner's main brief p.p.9-13)

III

PETITIONER DID NOT ENGAGE IN DILATORY TACTICS TO FORESTALL DEPORTATION.

Respondent in its brief would make it appear as if petitioner obtained several years of voluntary departure extensions on a pretext of illness. Drawing such a conclusion would warrant an inference as to ineptness by the District Director's staff in granting such extensions. It is to be noted that in 1972 the Service had severely tightened its policies in granting extensions of voluntary departure. This Court in Noel v. Chapman 568 F.2d 1023 (2d Cir.) was called upon to grant relief as a result of the above-mentioned stepped-up enforcement.

Far from the image respondent paints of an illegal alien

making all sorts of "motions" to delay his valid deportation, petitioner is a law-abiding hard-working decent young man who despite his facial disfigurement is trying to build a career for himself. His only violations of law were his overstaying in 1969 which the respondent had seen fit to forgive by granting him several years of voluntary departure.

Petitioner's several motions filed on and after June 8, 1976, were not, as respondent claims, dilatory. It was not until January 19, 1977 before petitioner eventually succeeded in having the BIA cease in its refusal to evaluate petitioner's claims which it theretofore deemed "naked".

This Court when called upon to review findings as to threshold statutory eligibility, preliminarily necessary to a discretionary grant, has consistently remanded the proceedings to the administrative authorities when it finds that the appropriate statutory, regulatory and case-law standards were not applied in finding statutory ineligibility and where no discretionary determination was made.* It therefore appears that respondent has gone to great lengths to create out of the BIA order of January 19, 1977 a decision it would like to be regarded as totally discretionary in nature.

*Francis v. INS 532 F2d. 268 (2d Cir. 1976); Tim Lok v. INS No.76-4204 decided Jan. 4, 1977(2d. Cir.) among others.

Petitioner does not allege abuse of discretion. Only the traditional concept as to the discretionary nature of motions would justify the BIA later order as a discretionary refusal to reopen petitioner's deportation hearing.

CONCLUSION

Pursuant to 5USC §706(2)(A) petitioner asks this Court to remand to the BIA its order of January 19, 1977 as one made not in accordance with law.*

Respectfully submitted,

PAUL RUBIN
Attorney for Petitioner

DATED: March 24, 1977

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*See Ness Investment Corp. et al v. U.S. Dept. of Agriculture et al. 512 F2d 706 at p.714, footnote 15:

> "To a great extent the problem we discuss here is one of words. Drafters of complaints seeking review of administrative action overwork the language of 5 U.S.C. §706(2)(A) pertaining to action "arbitrary", capricious, (and) as abuse of discretion" when the language of (A) pertaining to action "not in accordance with law," or that of (C) and (D) pertaining, respectively, to action "in excess of statutory jurisdiction, authority, or limations, or short of statutory right" and to action "without observance of procedure required by law" might better describe the problem with which the complaint is concerned. By pleading under the suggested language of the statute, a complainant avoids, at least semantically, raising the abuse of discretion-committed to agency discretion conundrum."

SUPPLEMENTAL APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
NEW YORK, NEW YORK

IN THE MATTER OF YI CHUN CHENG A16 027 125	APPEAL AND APPLICATION FOR STAY OF DEPORTATION

YI CHUN CHENG, by his attorney, ROBERT E. SLATUS, ESQ. hereby appeals the decisdon of the special inquiry officer denying his motion to reopen respondent's depostation hearing so that he may present new evidence and apply for a suspension of deportation.

The special inquiry officer was arbitray, capricious and abused his discretion in not allowing respondent to appear and argue the merits of motion. The special inquiry officer summarily decided that respondent's treatment and stay in the hospital was "to nebulous to warrant consideration as extoreme hardship." In fact respondent has received treatment for massive facial and cranial problems and was operated on for same. The record reflects the respondent's medival history and his stays in various hospitals.

The respondent hopes to return to Hing Kong for a visa eventually. He is the beneficiary of an approved labor certificate and currently has an I-140 sixth preference petition pending with the Immigration Service at New York City. Upon the approval of the sixth preference, respondent

will apply for an immigrant visa at the consul at Hong Kong.

The special inquiry officer stated that respondent admitted that his immediate family was in mainland China and therefore he has no family in the United States. Respondent acknowledges this fact and therefore the hardship to return to Hong Kong at this point, prior to his appointment to receive an immigrant visa would be an undue hardship.

Respondnet, after being in the United States for about seven and one half years is unfamilira with Hong Kong and has no one there that he can return to. While he does not have family in the United States he does have close friends and is currently employed with the petitoner of the approved labor certificate and the pending I-140 whose attestations of need for the respondent is on file. To send the respondent back to Hong Kong under these conditions would be an undue hardship after so long a period in the United States.

WHEREFORE respondent respectfully requests that:

(a) Deportation of the respondent be stayed pending the outcome of this appeal;

(b) That the motion to reopen the hearing so that respondnet may apply for a suspension of deportaion be granted and (c) in the alternative, respondent be granted the privilege of voluntray depraturo so that he may await the grant of his immigrant visa in Hong Kong.

Respectfully submitted by,

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becomes effective shall continue until the Board has disposed of the appeal.

[36 F.R. 316, Jan. 9, 1971]

§ 3.7 Notice of certification.

Whenever in accordance with the provisions of § 3.1(c) a case is required to be certified to the Board, the alien or other party affected shall be given notice of certification. A case shall be certified only after an initial decision has been made and before an appeal has been taken. If it is known at the time the initial decision is made that the case will be certified, the notice of certification shall be included in such decision and no further notice of certification shall be required. If it is not known until after the initial decision is made that the case will be certified, the officer of the Service having administrative jurisdiction over the case shall cause a Notice of Certification (Form I-290C) to be served upon the party affected. In either case the notice shall inform the party affected that the case is required to be certified to the Board and that he has the right to make representation before the Board, including the making of oral argument and the submission of a brief. If the party affected desires to submit a brief, it shall be submitted to the officer of the Service having administrative jurisdiction over the case for transmittal to the Board within ten days from the date of receipt of the notice of certification, unless for good cause shown such officer or the Board extends the time within which the brief may be submitted. The case shall be certified and forwarded to the Board by the officer of the Service having administrative jurisdiction over the case upon receipt of the brief, or upon the expiration of the time within which the brief may be submitted, or upon receipt of a written waiver of the right to submit a brief.

[23 F.R. 9118, Nov. 26, 1958]

§ 3.8 Motion to reopen or motion to reconsider.

(a) *Form.* Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent. In any case in which a deportation order is in effect, there shall be included in the motion to reopen or reconsider such order a statement by or on behalf of the moving party declaring whether the subject of the deportation order is also the subject of any pending criminal proceeding under section 242(e) of the Act, and, if so, the current status of that proceeding. If the motion to reopen or reconsider is for the purpose of seeking discretionary relief, there shall be included in the motion a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. Motions to reopen or reconsider shall state whether the validity of the deportation order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case.

(b) *Distribution of motion papers when alien is moving party.* In any case in which a motion to reopen or a motion to reconsider is made by the alien or other party affected, the three copies of the motion papers shall be submitted to the officer of the Service having administrative jurisdiction over the place where the proceedings were conducted. Such officer shall retain one copy, forward one copy to the officer of the Service who made the initial decision in the case, and submit the third copy with the case to the Board.

(c) *Distribution of motion papers when the Commissioner, or any other duly authorized officer of the Service is the moving party.* Whenever a motion to reopen or a motion to reconsider is made by the Commissioner or any other duly authorized officer of the Service, he shall cause one copy of the motion to be served upon the alien or party af-

(2)